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Universiti Malaya v Pemungut Duti Setem

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HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R2–25–108 OF 2003
WAN AFRAH J
2 OCTOBER 2006

C

Revenue Law — Stamp duty — Assessment — Appeal to High Court — Whether respondent had rightly assessed stamp duty on basis of aggregate costs for land and building — Whether stamp duty should only be assessed based on land costs — Whether appellant entitled to interest of 8%pa calculated based on excess payment it had made as from date of payment — Stamp Duty Act 1949 ss 2, 12A, First Schedule, item 32(a)

D

Statutory Interpretation — Construction of statutes — Literal approach — Whether court should apply strict literal interpretation approach in imposing stamp duty

E

The appeal in the instant case arose from the assessment of stamp duty by the respondent authority. The appellant, as the purchaser had entered into a triparte sales and purchase agreement ('SPA') with the vendor and the proprietor of the property. When the appellant entered into the triparte SPA, the land was vacant and no development had commenced yet. The respondent assessed the stamp duty in the sum of RM432,000 on the basis of the aggregate costs for the land and the building. The appellant was of the view that the respondent was wrong in assessing the stamp duty on the basis of the aggregate costs for the land and building when the land was vacant. It was the appellant's contention that the stamp duty should only be assessed solely based on the land costs. However, the respondent thought otherwise and maintained that the fact that the building had not been constructed when the SPA was executed did not absolve the appellant's obligation to pay the stamp duty for the portion of building costs as indicated in the agreement. In this respect the respondent submitted that the instant case was comparable to the usual practice of purchasing a house that had yet to be constructed in which case the buyer was still liable to pay the stamp duty on the total purchase price of the house yet to be constructed. The main issue in this appeal was therefore whether or not the respondent had rightly assessed the said duty on the basis of the aggregate costs for the land and building. In its appeal the appellant also prayed for interest of 8%pa calculated based on the excess payment it had made as from the date of payment, assuming the court decided in its favour.

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Held, allowing the appellant's appeal with costs disallowing the appellant's prayer for interest:

(1) Item 32(a) of the First Schedule of the Stamp Act 1949 imposes stamp duty on 'sale of property' which term should not be stretched artificially, as in the instant case, to include the costs of development of the building. Since the land in question was vacant at the material time and no development had yet begun, the strict literal interpretation approach dictates that only the costs of the land, be it the monetary consideration as stipulated under the SPA or the market value of the vacant land, whichever is the greater, should be the only basis of assessment of stamp duty. Moreover, a close scrutiny on the substance of the SPA invariably pointed to the conclusion that only the land costs should be considered for stamp duty assessment (see paras 8 & 9).

(2) The intention of the appellant to purchase the land and building was clearly qualified to the specific terms and conditions which are pre-requisite to the ignition of the whole transaction. When the SPA was read as a whole it was apparent that the land costs is to be paid on presentation of the transfer document and this signified the true intention of this agreement, ie, the purchase of the land was irrespective of the obligation to develop the building. It was therefore not possible to accede with the respondent's contention that the deal was one single transaction comprising of the land and building (see paras 11-13).

(3) Based on the same reasons the instant case was not comparable to that of purchasing a house that was not yet constructed. In any case, in interpreting tax statutes the court should not accept interpretation by inference or analogy (see para 14).

(4) The appellant was not entitled to interest in this appeal in the absence of any express provision under the Act allowing the court to grant the interest as claimed. The nature of the case did not permit the court to exercise any residual equitable remedies, if at all there were any (see para 17).

[Bahasa Malaysia summary

Rayuan dalam kes ini bermula daripada penilaian duti setem oleh kuasa responden. Perayu, sebagai pembeli telah menyertai perjanjian jual beli antara tiga pihak ('SPA') dengan penjual dan pemilik harta. Apabila perayu menyertai perjanjian jual beli antara tiga pihak tersebut, tanah tersebut kosong dan tiada pembangunan yang dijalankan lagi. Responden menilai duti setem dalam jumlah RM432,000 berdasarkan kos agregat untuk tanah dan bangunan. Perayu berpendapat bahawa responden telah silap dalam menilai duti setem atas dasar kos agregat untuk tanah dan bangunan apabila

A tanah tersebut kosong. Perayu mendakwa bahawa duti setem perlu dinilai berdasarkan kos tanah semata-mata. Walau bagaimanapun, responden berfikiran sebaliknya dan mengekalkan fakta bahawa bangunan tersebut yang belum lagi dibina apabila perjanjian jual beli disempurnakan tidak membebaskan perayu daripada kewajipan untuk membayar duti setem untuk
B bahagian kos bangunan seperti yang dinyatakan dalam perjanjian. Dalam kes ini responden menghujah bahawa kes ini boleh dibandingkan dengan amalan kebiasaan membeli rumah yang belum lagi dibina iaitu pembeli masih lagi bertanggungan untuk membayar duti setem bagi jumlah harga belian rumah yang belum lagi dibina. Oleh itu isu utama dalam rayuan ini adalah sama ada
C responden telah menilai duti tersebut dengan betul atas dasar kos agregat untuk tanah dan bangunan. Dalam rayuannya perayu juga memohon faedah sebanyak 8% setahun dikira berdasarkan bayaran lebihan yang dibuat daripada tarikh bayaran, seandainya mahkamah memutuskan bagi pihaknya.

D

Diputuskan, membenarkan rayuan perayu dengan kos tetapi tidak membenarkan rayuan perayu untuk faedah:

E (1) Butiran 32(a) Jadual Pertama Akta Setem 1949 mengenakan duti setem ke atas 'sale of property' yang mana terma tersebut tidak boleh diregangkan secara buatan, seperti dalam kes ini, untuk memasukkan kos pembinaan bangunan. Memandangkan tanah tersebut kosong pada masa material dan tiada lagi pembangunan dijalankan, pendekatan
F penterjemahan yang ketat menunjukkan bahawa hanya kos tanah, pertimbangan kewangan sepertimana yang dinyatakan dalam perjanjian jual beli atau harga pasaran tanah kosong, yang mana lebih baik, menjadi satu dasar penilaian duti setem. Tambahan lagi, penelitian yang teliti atas kandungan perjanjian jual beli sentiasa menunjukkan
G rumusan bahawa hanya kos tanah yang perlu dipertimbangkan untuk penilaian duti setem (lihat perenggan 8 & 9).

(2) Tujuan perayu membeli tanah dan bangunan tersebut dengan jelas layak mengikut terma-terma dan syarat-syarat spesifik yang mana
H adalah prasyarat kepada permulaan keseluruhan transaksi. Apabila perjanjian jual beli dibaca secara menyeluruh adalah jelas bahawa kos tanah perlu dibayar atas perserahan dokumen pindah milik dan ini menunjukkan tujuan sebenar perjanjian ini, iaitu, pembelian tanah tidak termasuk kewajipan untuk membangunkan bangunan. Oleh itu
I adalah mustahil untuk menyetujui pendapat responden bahawa urus niaga tersebut merupakan satu transaksi termasuk tanah dan bangunan (lihat perenggan 11-13).

(3) Berdasarkan sebab yang sama, kes ini tidak boleh dibandingkan dengan membeli rumah yang belum lagi dibina. Walau bagaimanapun, dalam

menterjemahkan statut cukai mahkamah tidak seharusnya menerima penterjemahan melalui inferens atau analogi (lihat perenggan 14).

(4) Perayu tidak berhak ke atas faedah dalam rayuan ini dalam ketiadaan peruntukan nyata di bawah Akta yang membenarkan mahkamah untuk memberikan faedah seperti yang dituntut. Ciri-ciri kes ini tidak membenarkan mahkamah untuk melaksanakan sebarang baki remedi ekuiti, sekiranya terdapat dalam kes ini (lihat perenggan 17).]

Notes

For cases on assessment of stamp duty, see 10 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 2523–2526.

For cases on literal approach, see 11 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 1753–1778.

Cases referred to

Collector of Stamp Duties v Ng Fah In & Ors [1981] 1 MLJ 288, FC (folld)

Commissioners of Inland Revenue, The v His Grace the Duke of Westminster [1936] AC 1, HL (folld)

Commissioners of Stamps (Queensland), The v Arnold Wienholt (1915) 21 CLR 69 (refd)

Eastern National Omnibus Co Ltd v Commissioners of Inland Revenue [1939] 1 KB 161 (distd)

Guna Sittampalam & Anor v Aik Hua Properties Sdn Bhd [1989] 2 MLJ 162, HC (distd)

Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors [1998] 2 MLJ 158; [1998] 2 CLJ 665, CA (distd)

Lim Kar Bee v Abdul Latif bin Ismail [1978] 1 MLJ 109, FC (distd)

Prudential Assurance Co Ltd v Inland Revenue Commissioners [1993] 1 WLR 211, Ch D (folld)

Shell Malaysia Trading Sdn Bhd v Pemungut Duti Setem, Pulau Pinang (1998) MSTC 3666 (refd)

United Malayan Banking Corp Bhd v Pekeliling Triangle Sdn Bhd and another appeal [1991] 2 MLJ 559, SC (refd)

Western United Investment Co Ltd v Inland Revenue Commissioners [1958] 1 All ER 257, Ch D (folld)

Legislation referred to

Civil Law Act 1956 s 11
National Land Code Form 14A
Stamp Act 1949 ss 2, 12A(b), First Schedule, item 32(a)

KK Wong (Lee Hishammuddin Allen & Gledhill) for the appellant.
Ashrina bt Ramzan Ali (Legal Department, Inland Revenue Board) for the respondent.

Wan Afrah J:

[1] The appeal before me is in regard to the assessment of stamp duty arrived at the sum of RM432,000 by the respondent in respect of the transfer of the specific property pursuant to a triparte sales and purchase agreement ('SPA') entered amongst the appellant, as the purchaser, the vendor and the proprietor of the said property on 28 March 2002.

[2] As will be apparent in the subsequent discussion, the main contention here is in regard to the basis of assessment adopted by the respondent in arriving at that duty, to be specific, the issue is whether or not the respondent has rightly assessed the said duty based on the sum of RM14,600,000, being the aggregate costs for the land and building. The appellant argued that in their case, stamp duty should only be assessed solely based on the land costs whereas the respondent argued otherwise. Pertinent to this deliberation is the issue of validity of the valuation report tendered in support by both parties as well as the issue of whether or not the appellant is entitled to 8% interest pa calculated based on the excess payment, starting from the date of payment on 5 June 2003, assuming the court decides in their favour.

[3] On 2 October 2006 I have allowed the appeal with costs by ordering the respondent to refund the excess payment of RM360,000 to the appellant. However, I disallowed the appellant's prayer for interest. I now set out my reasons as follow.

THE VALIDITY OF THE ASSESSED STAMP DUTY AMOUNTING TO RM432,000

[4] For all intents and purposes, it seems clear to me that the parties do not dispute on the relevant provisions under the Stamp Act 1949 ('SA'). As such, I perceive it will not cause any injustice for me to just briefly set out the relevant provisions under the SA for the ease of our reference hereinafter. Accordingly, item 32(a) of the First Schedule of SA provides that the duty levied is *ad volerem* based on the money value of the consideration or the market value of the property, whichever is the greater. In assessing the market value of the property, s 12A(b) of the SA stipulates, briefly, that the date for determining the market value of the property being transferred implementing a sale under a duly stamped agreement of sale and purchase, as in this case, shall be the date of execution of the agreement. And the term property connotes its meaning as provided under s 2 of the SA to include *'movable or immovable property and any estate or interest in any property movable or immovable, whether in possession, reversion, remainder or contingency, any debt,*

and any thing in action, and any other right or interest in the nature of the property which is capable of being disposed of and has a value in it'.

[5] That said, the appellant argued that when the tri-parte SPA was entered on 28 March 2002, the land was vacant and no development had commenced yet. As such, it is submitted by the appellant that the respondent was wrong in accessing the stamp duty on the basis of the aggregate costs for the land and building. Rather, it is averred that the correct proposition ought to be that of the land costs solely ie RM2.6m, as reflected in the transfer form of the land submitted to the land office, ie Form 14A as well as the assessment form, ie 'PSD 15' submitted to the respondent.

[6] On the other hand, the respondent argued that it is beyond dispute that the SPA envisages not only the land, but the building as well. This is evident, as pointed out by the respondent, in recital D of the SPA which provides that the whole deal agreed upon between the parties is in respect of *'the land free from all encumbrances with vacant possession together with a 13 storey building'*. It was highlighted that pursuant to recital E, reading together with the defining clause, the building and the land are *collectively* referred to as 'Property' in the SPA. Further, the 'Price' of the deal, is referred to as the aggregate of both the land and building costs amounting to RM14,600,000 as defined under cl 1.1. The most obvious manifestation of the above intendment, according to the respondent, is fortified in cl 4.1 where it was provided that *'notwithstanding this apportionment (between the land costs and building costs), the parties agree that the Land and Building are sold and purchased jointly and are not severable'*.

[7] Against this backdrop, the respondent sought to impress upon the court that the fact that the building has not been constructed or even yet to commence any development when the SPA was executed, the same does not absolve the appellant's obligation to pay the stamp duty for the portion of building costs as indicated in the agreement. The respondent contends that the instant scenario is comparable, in fact analogous to the usual practice of purchasing of a house not yet constructed. It is said that under such circumstances, it is not uncommon that the buyer would still liable to pay the stamp duty on the total purchase price of the house yet to be constructed. Moreover, the respondent submits that the progressive payment as detailed in schedule (6) of the SPA clearly contemplates such intendment of one single transaction covering the delivery of both the land and the building under the agreed deal. As such, the respondent argued that the land and the building are not severable and the stamp duty imposed is correct based on the aggregate costs for the land and building.

[8] With utmost of respect to learned counsel for the respondent, I think

A their argument elaborately set out above is miscalibrated. To my mind, the development costs of the building ought not have been taken into consideration in determining the market value of the land at the date of the execution of the SPA. First and foremost, item 32(a) of the SA imposes stamp duty on 'sale of property'. In the absence of any express intention to the
B contrary, the term 'sale of property' should not be stretched artificially, as in the instant case, to include the costs of development of the building. The strict literal interpretation approach on statues imposing duties as upheld in the case of *United Malayan Banking Corp Bhd v Pekeliling Triangle Sdn Bhd and another appeal* [1991] 2 MLJ 559 deserves coherent observance in our
C instant case. Indeed, I would add that no amount of forceful contention, as submitted by the respondent in this case, could justify the court to read into the statute concerned duties beyond that expressly sanctioned by the Legislature — for statutes imposing duties enjoy no interpretive elasticity, at
D least on the part of the imposer, they could not be stretched nor shrink at their own whim and fancy, and any ambiguity ought to be resolved in favour of the subject: *Shell Malaysia Trading Sdn Bhd v Pemungut Duti Setem, Pulau Pinang* (1998) MSTC 3666 and *The Commissioners of Stamps (Queensland) v Arnold Wienholt* (1915) 21 CLR 69. As such, I am of the view that as
E s 12A(b) of the SA provides that the market value of the land must be determined at the date of execution of the SPA, since the land concerned was vacant at the material time and no development has yet begun, strict interpretive rule dictates that only the costs of the land, be it the monetary consideration as stipulated under the SPA, or the market value of the vacant
F land, whichever the greater, should be the only basis of assessment of stamp duty.

[9] Even assuming that my reasoning above is wrong, a close scrutiny on the substance of the SPA will invariably points to the conclusion that only the
G land costs should be considered for stamp duty assessment. Pertinent to this scrutiny is the revelation that the analogy drawn by the respondent as illustrated above is inherently and logically flaws for the fact, or rather the substance of the instant case downright differs from that of purchasing a house not yet constructed. Before I venture into the distinctions between the
H two, it is suffice for me to concur with the dictum of Lord Russell of Killowen, that in interpreting tax statute, the court should not accept interpretation by inference or analogy: *The Commissioners of Inland Revenue v His Grace the Duke of Westminster* [1936] AC 1.

I **[10]** The most vital distinction, to my mind, lies not on the question of whether or not there is separate agreement evincing the costs for the land from that of the costs for the development of the building, as suggested by the respondent. Neither, in my humble view, hinges on whether or not there is a separate indication of the said costs contained within the same agreement,

as contended by the appellant. The former argument, with all due respect to learned counsel for the respondent, defies logic to the extent that if that argument is taken as correct, in effect, the respondent is suggesting that so long as there is a separate agreement dealing with the costs for development of the building, stamp duty could only be imposed on the sale of land.

[11] I am also of the view that the intention of the appellant to purchase the land and building is however clearly qualified to the specific terms and conditions which are prerequisite to the ignition of the whole transaction. This is evident in cl 2.2 reading together with cl 3.1, whereby the approval for the building plan and the transfer of the land has been made conditions precedent to the sale. Further, cll 3.4–3.8 laid down the various possibilities on the outcomes of the application for the necessary approvals and the corresponding rights and remedies entitled to appellant. In furtherance thereto, contingency resolution is well defined in event of non-compliance or purported termination of the contractual relationship of either party. It is observed that the tri-parte SPA is not a standard statutory contract as provided under the law. Rather, it resembles the encapsulation of the parties' performance obligations and remedies which has been negotiated and agreed upon at arm length discussion. To this end, cll 20 and 21 postulate the glaring effects of termination by either party towards the performance of the contract, whereby, it is stated that in any event, the appellant will retain the land despite the termination for whatever reasons it may be, including the non-completion or non-delivery of vacant possession of the building.

[12] To my mind, it is in light of this specific contemplation of the appellant, which is the core substance or underlying basis of the agreement between the parties, whereby the provision of separate division of land costs and building costs, as spelt out under cl 4, and the progressive installment payment of the said costs as detailed in schedule (6) to the SPA ought to be correctly appreciated. When read in this light, it will be apparent that the fact that the land costs is to be paid on presentation of the transfer document signify the true intention of this agreement, ie the purchase of the land irrespective of the materialisation of other obligations to develop the building as envisaged.

[13] That said, I therefore could not accede to the respondent contention that the deal is one single transaction comprising of the land and building. What if, assuming that somehow or rather, for whatever reason it is worth, the appellant decided not to proceed with the development of the building, which they are absolutely entitle to undertake such course under the agreement, or that the vendor is unable or not willing for whatever reason to proceed with the deal, what is the remedy readily available to the appellant? Under the present case, the appellant is safeguarded at least in respect of the

possession of the land, subject to the payment of the same to the vendor, and the parties is at liberty to terminate their relationship subject to other ancillary indemnity and compensation to be furnished by the defaulting party, and that is all. That being the case, in my humble view, I find it difficult to comprehend the logic that ad volerem stamp duty is to be imposed based on the composite calculation of the land and building costs: in this scenario, isn't it that the respondent has overcharged duties for the 'sale of property' — if ever we could coin the delivery of the building in the instant case as one — which has not been materialised? On this basis, I perceive that it is wrong for the respondent to rely on the potential development of the land. *Eastern National Omnibus Co Ltd v Commissioners of Inland Revenue* [1939] 1 KB 161 distinguished.

[14] Having considered all the above factors, in particular the substance of the agreement, I am unable to subscribe to the argument forwarded by the respondent that the instant case is comparable to that of purchasing of a house not yet constructed. To my mind, for the reasons and distinctions that I have elaborately discussed in the foregoing paragraphs, as well as the rationales as propounded in the case of *The Prudential Assurance Co Ltd v Inland Revenue Commissioners* [1993] 1 WLR 211, of which I fully endorsed with, the respondent's contentions here must unavoidably deteriorate and fail.

THE VALUATION REPORT

[15] Having concluded above that the respondent had erred in assessing the stamp duty by taking into consideration the aggregate costs for the land and building, instead of the land costs solely; it is suffice for me to state here that the respondent also had not satisfactorily dispel any doubts casted on the validity of their valuation report. I noted that the valuation was done twice, once on 29 January 2003 and on 20 August 2003. In fact, I am perplexed with the explanation that was accorded by the respondent that the first valuation on 29 January 2003 was for the purpose of the PDS 15 form, ie and the assessment notice and the second inspection done on 20 August 2003 was for the purpose of making a 'further comprehensive report', resulted in the final evaluation report issued on 22 August 2003. The existence of these two inspections, after the lapse of seven months period from the first inspection, raises suspicions on the assessment conducted by the respondent. This is fortified in view of the contradictory market value arrived upon the two inspections. In the former, RM14.6m was indicated in the assessment notice whereas in the latter, RM14,366,380 was reported in the evaluation report. Though I would refrain myself from making a findings that the final valuation report issued on 22 August 2003 is a mere afterthought to justify the assessment sum indicated in the earlier assessment notice, as impugned by

the appellant, I consider that the least I could say in this regard is that the manner in which the inspection and valuation is conducted in this case is far from satisfactory.

[16] That said notwithstanding, looking at the two valuation reports tendered on behalf of the respective party, I tend to agree with the market value derives by the appellant, for there are cogent factors, in particular the fact that the land is situated next to the cemetery (per *Collector of Stamp Duties v Ng Fah In & Ors* [1981] 1 MLJ 288) and the surrounding locality consisting of village houses and low costs flats, which to my mind, should carry substantial bearings on the market value, which was seemingly ignored by the respondent. Apart from that, it remains doubtful as to the actual calculation or formula of computation endorsed by the respondent in arriving at the final figure, which was clearly omitted in their final evaluation report. Such inadvertence on the part of the respondent necessarily incapacitated the court to truly appreciate the rationales behind their assessment.

INTEREST OF 8%PA ON EXCESS PAYMENT FROM 5 JUNE 2003

[17] Upon hearing the submission from learned counsel for the appellant, in as much as I would respectfully concur with the decision in the case of *Lim Kar Bee v Abdul Latif bin Ismail* [1978] 1 MLJ 109, *Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors* [1998] 2 MLJ 158; [1998] 2 CLJ 665, and *Guna Sittampalam & Anor v Aik Hua Properties Sdn Bhd* [1989] 2 MLJ 162, it is beyond dispute that the cases cited above could be easily distinguished on facts from the instant case. In fact, I observed that none of the cases above deal with appeal from the assessment of stamp duty. Moreover, in as much as the strict literal interpretation rule applies against the respondent, I do not perceive there ought to be any discounted treatment in favour of the appellant in this regard: *UMBC v Pekeliling Triangle Sdn Bhd* [1991] 2 MLJ 559. Furthermore, s 11 of the Civil Law Act 1956 covers only instances of recovery of debt and damages, which was neither the case here, therefore, in the absence of any express provision under the SA allowing the court to so grant the interest as claimed, I do not think the nature of the case could permit the court to exercise any residual equitable remedies, if at all there is one: per *Western United Investment Co Ltd v Inland Revenue Commissioners* [1958] 1 All ER 257.

Appeal allowed with costs.

Reported by K Nesan